Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. 79-581

LEAGUE TO SAVE LAKE TAHOE, INC., a California membership corporation; CLAUDIA CORUM; DONNA ATHERTON; HILTON ATHERTON; JERRY FELDMILLER; MARILYN FELDMILLER; MARK LITZ; JOHN McCAULEY; JOHN CALLISTER; BRUCE BOHLMAN; DELTA MACK; PHIL HANNIFAN; JANET HANNIFAN; and JEFF HARRY,

Petitioners,

VS.

ROGER S. TROUNDAY, Director of the Nevada Department of Human Resources; STATE OF NEVADA; NEVADA DEPARTMENT OF HUMAN RESOURCES; OLIVER KAHLE; and TED JENNINGS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
I. THE COURT OF APPEALS ERRED IN RULING THAT NEVADA'S COMPLEX SOURCE LIMITATION WAS SATISFIED BY THE ISSUANCE OF A PERMIT, WHETHER OR NOT A PROPOSED SOURCE WOULD ACTUALLY VIOLATE AMBIENT AIR QUALITY STANDARDS	12
II. THE COURT OF APPEALS IMPROPERLY CONCLUDED THAT A CITIZENS SUIT UNDER CLEAN AIR ACT §304 CONSTITUTES AN ATTEMPT TO SEEK REVIEW OF STATE AGENCY ACTION	17
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) 18

Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976)..... 20

Hancock v. Train, 426 U.S. 167, 198 (1976) 15

Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969) 13

Natural Resources Defense Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975) 19

Plan for Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (9th Cir.) cert denied, 419 U.S. 1034 (1974) 14

Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975)..... 19

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) 17

Statutes:

Clean Air Act:
§109(b)(1) 5
§110(a)(2)(B)..... 7
§110(a) 4, 6
§304 ..... 12, 19, 20, 22
§304(a) 3, 4, 5, 11, 16, 18, 21
§304(f) 12

Statutes: Page

Clean Air Act:
§307 22
§307(b)(d) 22

Nevada Revised Statutes:
§445.446(2) 7
§445.456(1) 5

United States Code:
28 U.S.C. §1254(1) 3
28 U.S.C. §1331(a) 5
42 U.S.C. §7409(b)(1) 5
42 U.S.C. §7410 6
42 U.S.C. §7410(a)..... 4, 6
42 U.S.C. §7410(a)(2)(B) 7
42 U.S.C. §7604(a) 3,4,5, 11, 14, 15, 16, 18, 21
42 U.S.C. §7604(e)(3) 12
42 U.S.C. §7607(b), (d) 22

Regulations:

Code of Federal Regulations:
40 C.F.R. §50.8 6
40 C.F.R. §51.18(a), (b) 7
40 C.F.R. §52.1472 9

Nevada Air Quality Regulations:
§3.2.1 - 3.2.6 4
§3.2.2 8
§13.1.1 - 13.2.1 4
§13.1.1 8
§13.1.3 9
§13.2.1 8

Miscellaneous:

An Legislative History of the Clean Air Act Amendments of 1970, 93rd Cong., 2d Sess., Vol. 1, p. 353 (Ser. No. 93-18, Jan. 1974) 20

Senate Report No. 91-1196, 91st Cong., 2d Sess. (1970) 19

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioners, The League to Save Lake Tahoe, Inc., a California membership

corporation; Claudia Corum; Donna Atherton; Hilton Atherton; Jerry Feldmiller; Mark Litz; John McCauley; John Callister; Bruce Bohlman; Delta Mack; Phil Hannifan; Janet Hannifan; and Jeff Harry, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 15, 1979. That judgment and opinion affirmed a judgment, opinion, and order dismissing action, entered by the United States District Court for the District Court for the District of Nevada, said judgment, opinion, and order being entered on March 10, 1977.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit of which petitioners seek review is appended hereto as Appendix B. The order dismissing action, as entered in

the United States District Court for the District of Nevada, is appended hereto as Appendix A.

JURISDICTION

The Court of Appeals judgment was entered on June 15, 1979. This petition is being filed within 90 days of said date. This court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does possession of a permit from state authorities, regardless of whether such permit was validly issued, constitute compliance with a substantive emission limitation so as to immunize the permit-holder from liability under the citizen suit provision of Clean Air Act §304a, 42 U.S.C. §7604(a)?

2. Is a citizen suit under Clean Air Act §304(a), 42 U.S.C. §7604(a), merely a procedure to review a state agency determination, or does it constitute a distinct, independent cause of action when a state has issued a permit under its Implementation Plan?

STATUTES INVOLVED

The statutes involved are these:

1. Clean Air Act §304, 42 U.S.C. §7604.

2. Clean Air Act §110(a), 42 U.S.C. §7410(a).

3. Nevada Air Quality Regulations, §§3.2.1 - 3.2.6 and 13.1.1 - 13.2.1. These statutes are set out <u>verbatim</u> in Appendix C.

STATEMENT OF THE CASE

This is an action by the League to Save Lake Tahoe, Inc., a California non-

profit membership corporation, made up largely of property owners in the Lake Tahoe basin, and 13 individual residents of the same area under the citizen suit provision of §304(a) of the federal Clean Air Act, 42 U.S.C. §7604(a), and the federal question statute, 28 U.S.C. § 1331(a). The respondents are the owners of two hotel-casinos now in the early stages of construction on the south shore of Lake Tahoe at Stateline, Nevada; the State of Nevada; the Nevada Department of Human Resources; and its Director. The state respondents are the designated air pollution control authorities for purposes of the Clean Air Act, pursuant to N.R.S. §445.456(1).

Pursuant to Clean Air Act §109(b)(1), 42 U.S.C. §7409(b)(1), the Environmental Protection Agency promulgated primary ambient air quality standards for carbon

monoxide (CO), designed to protect public health. 40 C.F.R. §50.8. The maximum CO concentrations permissible under the standards are 35 parts per million (p.p.m.) for a one-hour period and 9 p.p.m. for any 8-hour period. The mechanism for achieving these standards is set forth in section 110 of the Clean Air Act, 42 U.S.C. §7410. Under section 110(a), 42 U.S.C. §7410(a), each state is required to adopt "a plan which provides for implementation, maintenance, and enforcement" of the ambient air quality standards and to submit its implementation plan to the EPA Administrator for approval. The statute sets forth several specific requirements for a state implementation plan, ("SIP"), including a mandate that a SIP must contain:

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary and secondary standards, including,

> but not limited to, land use and transportation controls. Clean Air Act §110(a)(2)(B), 42 U.S.C. §7410(a)(2)(B).

EPA has further amplified this statutory requirement through regulations which require, inter alia, that each implementation plan contain procedures for reviewing potential new sources of pollution and for preventing their construction if they would interfere with the attainment or maintenance of the ambient standards. 40 C.F.R. §51.18 (a), (b). If the plan submitted by the state meets the statutory and regulatory criteria, it must be accepted by EPA and thereafter becomes a part of federal law, enforceable in the federal courts.

Nevada submitted such an implementation plan to EPA in the form of certain statutes and air quality regulations. The portion of the Nevada SIP relevant to this case deals with "complex sources of air pollution," which are defined by N.R.S. §445.446(2):

> any property or facility that has or solicits secondary or adjunctive activity which emits or may emit any air contaminant for which there is an ambient air quality standard, notwithstanding that such property or facility may not itself possess the capability of emitting such air contaminants. Complex sources include, but are not limited to (a) highways and roads; (b) parking facilities ... (d) recreation, amusement, sports, or entertainment facilities.

The Nevada air quality regulations establish a mechanism for assuring that new complex sources will not be constructed if they would cause violations of the ambient standards. Section 3.2.2 forbids construction of a new complex source without obtaining a valid registration certificate. Section 13.2.1 specifically requires a permit application for construction of any new parking facility or other structure with associated parking facilities for 1,000 or more cars.

Under §13.1.1 of the Nevada air quality regulations, the owner of a proposed new complex source must apply to the Director

of the Department of Human Resources for a registration certificate and must submit an environmental evaluation of the project. If the environmental evaluation shows, or if the Director determines that the source will prevent the attainment or maintenance of an applicable ambient air quality standard, the Director may not issue a registration certificate, under the terms of Regs. §13.1.3. These complex source review provisions of the Nevada SIP have been approved by EPA (40 C.F. R. §52.1472) and remain in force as the applicable SIP for the state. (See Appendix B, note 2)

On August 12, 1974, respondents Kahle and Jennings each submitted applications for registration certificates for proposed new parking facilities for more than 1,000 cars adjacent to two new casino-hotels. On the basis of the environmental analyses submitted by respondents Kahle and Jennings, respondent

Trounday first refused to grant them certificates because their parking facilities, as initially planned, would result in violations of the CO ambient air quality standards. After the applicants had submitted revised applications incorporating substantial changes in their plans, respondent Trounday concluded that the facilities, as revised, would not violate the standards, so he issued certificates to respondents Jennings and Kahle on April 15, 1975 and May 19, 1975, respectively.

In fact, this determination by respondent Trounday was erroneous; even with the changes made by the applicants, their parking facilities would still interfere with attainment and maintenance of the ambient CO standards. Therefore, the registration certificates could not have been lawfully issued. Petitioners submitted evidence of this fact to respondent Trounday, but he refused to cancel the certificates. Thereupon,

petitioners brought the present action, in the District Court for Nevada seeking a declaration that the registration certificates are invalid and an order restraining respondents Kahle and Jennings from constructing the parking facilities unless and until valid certificates can be issued. Judge Thompson ordered the action dismissed on March 10, 1977 (see Appendix A) and the dismissal was affirmed by the Ninth Circuit Court of Appeals on June 15, 1979.

The Court of Appeals specifically held that the Nevada complex source limitations were, in fact, "emission limitations," within the meaning of Clean Air Act §304(a), which permits any citizen to commence a civil action against any person or state "who is alleged to be in violation of an emission standard or limitation under this chapter . . . " The court referred to the expanded definition of "emission limitation" added by the 1977 amendments to the Clean Air Act:

"any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans . . . under an applicable implementation plan." 42 U.S.C. §7604(e)(3). (Appendix B, p. 9) The court noted that ". . . the amendment to §304(f) in effect places in the same category as substantive emission requirements any indirect source review provision adopted and approved as part of a state plan." (Appendix B, p. 11) "Thus, " the Court of Appeals concluded, "the District Court had jurisdiction under §304 of the Act to consider the alleged violation of the Nevada complex source regulations." (Appendix B, p. 13)

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS ERRED IN RULING THAT NEVADA'S COMPLEX SOURCE LIMITATION WAS SATISFIED BY THE ISSUANCE OF A PERMIT, WHETHER OR NOT A PROPOSED SOURCE WOULD ACTUALLY VIOLATE AMBIENT AIR QUALITY STANDARDS

As noted above, the Court of Appeals conceded that the indirect source limitations contained in the Nevada SIP do, in fact, constitute "emission limitations" as that term is defined in Clean Air Act §304(a). Furthermore, for purposes of the motion to dismiss, it must be assumed that petitioners can prove their allegation that the ambient air quality standards will, in fact, be violated, because of emissions associated with respondents' garages. See Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). Indeed, Judge Thompson conceded: "It is reasonably clear, however, that construction of a new complex source may create a condition which will be in violation of an emission limitation within the meaning of the jurisdictional grant." (See Appendix A, p. 7) But, Judge Thompson concluded, "whether or not the state agency, in the

opinion of plaintiffs, made a wrong decision is irrelevant." (Appendix A, p. 9)

The Court of Appeals accepted this view of the law. The rationale for this astonishing conclusion (Appendix B, pp. 14-16) manifests a fundamental misunderstanding of petitioners' claim and the nature of a citizens suit under the Clean Air Act. The Court asserted that petitioners are alleging nothing more than "a prospective violation of the ambient air quality standards." (Appendix B, p. 14) It correctly cites cases such as Plan for Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (9th Cir.) cert denied, 419 U.S. 1034 (1974) for the proposition that a mere allegation that an ambient air quality standard will be violated does not state a claim under Clean Air Act §304(a). However, the present case does not involve merely a violation of ambient air quality standards. We have here a

apecific, substantive limitation, designed to make sure that the ambient air quality standards are achieved. Sections 3.2.2 and 13.1.3 of the Nevada SIP together impose a restriction that a new complex source which will prevent the achievement or maintenance of the ambient standards may not be built. That substantive limitation is enforced by means of a procedural scheme involving the issuance of permits by a state agency.

The Court of Appeals failed to grasp the distinction between the substantive limitation (no construction of complex sources which would violate air quality standards) and the procedural enforcement mechanism (issuance of permits) contained in the Nevada SIP. This distinction, in the context of Clean Air Act §304(a), was emphasized by this court in Hancock v. Train, 426 U.S. 167, 198 (1976), which noted "[t]he absence in §304 of any express provision for enforcing

state permit requirements in federal court . . ." The Court of Appeals concluded, however, (Appendix B, p. 15) that "emission standards or limitations under §304(a) would also include the procedural provisions of the Nevada State Implementation Plan," including the requirements that a complex source must apply for a certificate and that the certificate not be issued under certain conditions. The Court reasoned that, since the procedural requirements had been met, the emission limitation was ipso facto satisfied. But this is a gross misapplication of the law. The objective of the Clean Air Act is a reduction of air pollution to safe levels, not the issuance of pieces of paper. Under the court's construction of the law, possession of a permit would insulate a polluter from a citizen suit, no matter how egregious his air pollution violation may be and regardless of any errors made by the official granting the permit.

Petitioners submit that such an absurd interpretation of the Clean Air Act should not be permitted to stand.

II. THE COURT OF APPEALS IMPROPERLY CONCLUDED THAT A CITIZENS SUIT UNDER CLEAN AIR ACT §304 CONSTITUTES AN ATTEMPT TO SEEK REVIEW OF STATE AGENCY ACTION

The Court of Appeals agreed with the District Court that "appellants are simply attempting through this action to obtain federal court review of an administrative decision entrusted by Congress to state officials." (Appendix B, p. 15) It applied the usual rule that in reviewing an Administrator's determination on technical questions, the Court will defer to the agency's discretion unless the decision violates a specific statute or regulation. (Appendix B, p. 16) This Court has forcefully emphasized the limited nature of judicial review of an agency's consideration of environmental factors in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435

U.S. 519 (1978). In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), this Court emphasized that an administrative decision could be overturned by the courts only if it was not based:

> on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

But Congress did not intend to show such deference to the enforcement decisions of state air pollution officials. Rather, citizen suits under §304(a) were seen as an essential means to ensure observance of clean air standards when state officials are unwilling or unable to provide such enforcement. This Court has recognized that the states have had a "disappointing" record in dealing with air pollution problems and that "Congress reacted by taking a stick to the States in the form of the Clean Air Act amendments of

1970." Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975).

As the District of Columbia Circuit noted: "The citizen suit provision reflected a deliberate choic by Congress to widen citizen access to courts as supplemental and effective assurance that the Act would be implemented and enforced." Natural Resources Defense Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975). The N.R.D.C. case quoted the Senate Report on the 1970 amendments, which stated: "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970), pp. 36-37. To the same effect, see a memorandum on §304 submitted to the Senate by Sen. Muskie, the major sponsor of the 1970 amendments, indicating that citizen suits provide

a method of achieving compliance with air pollution requirements beyond the capabilities of "fully extended" state agencies. "A Legislative History of the Clean Air Act Amendments of 1970," 93rd Cong., 2d Sess., Vol. 1, p. 353 (Ser. No. 93-18, Jan. 1974).

Finally, the Second Circuit Court of Appeals has emphasized the salutary role of citizen proceedings in Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976):

> In enacting §304 of the 1970 amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests.
>
> . . . .
>
> [B]oth the underlying rationale and legislative history surrounding the citizen suit provision demonstrate that Congress intended the District Court to enforce the mandated air quality plan irrespective of the failings of agency participation. As noted earlier, the very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.

Thus, Congress clearly intended that citizen

efforts to enforce the goals of the Clean Air Act were not to be stymied by state bureaucrats' failure to take action on evidence that air pollution standards are or could be violated. Instead, it provided a separate forum, the federa district courts, by means of which inaction by recalcitrant state agencies could be overcome.

It should be emphasized that §304(a) does not speak of review of agency action, but rather refers to "a civil action" against violators of state implementation plans. Thus, as in any civil action, the plaintiff bears the burden of producing affirmative evidence that a cause of action exists, and the court, as usual, decides the case on the basis of the preponderanc of the evidence. The normal panoply of pre-trial discovery devices, including depositions and interrogatories, as well as testimony and cross-examination at trial, apply. But, under the Court of Appeals' view of the law, once a state agency has issued a permit, citizens are

stripped of their rights to engage in discovery and convince a judge of possible violations by a preponderance of the evidence. Instead, they are relegated to the status of supplicants for judicial review of discretionary state action with no opportunity for adducing additional facts before the court.

That §304 is not merely a means of judicial review can be seen by contrasting its language with the provisions of Clean Air Act §307(b) and (d), 42 U.S.C. §7607(b) and (d). Those sections provide for actual judicial review of various decisions by the Environmental Protection Agency and establish elaborate procedures for compiling and reviewing the administrative record. Clearly, if Congress had intended for actions under §304 to constitute no more than judicial review, language and procedures similar to those in §307 could have been used. Since

they were not, it should be obvious that a citizen suit is an original action, not a review proceeding.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: September 6, 1979

Respectfully submitted,

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LEAGUE TO SAVE LAKE TAHOE v. TROUNDAY

U.S. District Court
District of Nevada

LEAGUE TO SAVE LAKE TAHOE, INC., ET AL. v. ROGER S. TROUNDAY, ET AL., Civil R-76-85-BRT, March 9, 1977

Full Text of opinion
ORDER DISMISSING ACTION

This is an action brought by plaintiffs above named against defendants above named to enforce the requirements of the Clean Air Act (42 U.S.C. 1857, et seq.). Jurisdiction is predicated on the citizen suit provisions of the Clean Air Act (42 U.S.C. 1857h-2) and 28 U.S.C. 1331a. The individual defendants Kahle and Jennings are owners and operators of hotels about to be constructed at the south end of Lake Tahoe, Nevada.

The action is before the Court on the several motions to dismiss filed by defendants.

To state the facts the Court can do no better than copy the charging allegations of the concise, lucid and well-pleaded Amended complaint.

"8. Under §109(b)(1) of the Clean Air Act, 42 U.S.C. §1857c-4(b)(1), EPA is required to promulgate primary ambient air quality standards which are requisite to protect the public health. EPA has promulgated such standards for carbon monoxide (CO) at 40 C.F.R. §50.8. The maximum CO concentrations permissible under the standards are 35 parts per million for a one-hour period and 9 parts per million for an eight-hour period.

"9. Section 110(a) of the Clean Air Act, 42 U.S.C. §1857c-5(a) requires each state to submit to the federal Environmental Protection Agency ("EPA") a plan which provides for implementation, maintenance, and enforcement of the primary ambient standards. The State of Nevada submitted such an implementation plan to EPA and the portion thereof concerned with the CO standards was approved and accepted, 40 C.F.R. §52.1472. That implementation plan includes the various state statutory and regulatory provisions discussed in paragraphs 10, 11 and 15.

"10. Section 3.2.2 of the Nevada air quality regulations makes the obtaining of a valid registration certificate a prerequisite to the construction of any complex course of air pollution. 'Complex cource' is defined by N.R.S. §445.446(2) as 'any property or facility that has or solicits secondary or adjunctive activity which emits or may emit any

air contaminant for which there is an ambient air quality standard, notwithstanding that such property or facility may not itself possess the capability of emitting such air contaminants. Complex sources include, but are not limited to (a) highways and roads (b) parking facilities . . . (d) recreation, amusement, parks, or entertainment facilities.' Sections 13.2.1 and 13.2.4 of the Nevada air quality regulations specifically require a permit application for construction of any new parking facility or other structure with associated parking facilities for 1000 or more cars.

"11. Under §13.1.1 of the Nevada air quality regulations, the owner of a proposed new complex source must apply to the director of the Department of Human Resources for a registration certificate and must submit an environmental evaluation of the project. If the environmental evaluation shows, or if the Director determines that the source will prevent the attainment or maintenance of an applicable ambient air quality standard, the Director may not issue a registration certificate, under the terms of Regs. §13.1.3.

"12. On August 12, 1974, defendant Kahle submitted an application for a registration certificate for a new hotel and casino to be constructed on a 24-acre parcel of Highway 50 and State Route 19 in Stateline, Nevada. The plans call for 33,512 square feet of casino floor space, 960 hotel rooms, and miscellaneous theatre, dining and meeting facilities, with parking for 2400 cars. On the basis of the environmental analysis and amendments thereto submitted by defendant Kahle, defendant Trounday concluded that construction of the hotel-casino as planned would result in violations of CO ambient standards and accordingly required major changes in the amount of casino floor space, highway access plans, and parking garage operations procedures. With these changes, defendant Trounday concluded that such violations would not occur and, accordingly issued registration certificate No. 88 to defendant Kahle on May 19, 1975.

"13. On August 12, 1974, defendant Jennings submitted an application for a registration certificate for a new hotel and casino to be constructed on a 20-acre parcel across Highway 50 from the proposed Hotel Oliver in Stateline, Nevada. The plans call for 32,350 square feet of casino floor space, 560 hotel rooms, and various convention and theatre facilities, with parking for 1600 cars. On the basis of the environmental analysis submitted by defendant Jennings, defendant Trounday concluded that construction of the hotel and casino as planned would result in violations of ambient CO standards, and accordingly required major changes in the amount of casino floor space, highway access plans, and parking garage operations procedures. With these changes, defendant Trounday concluded that such

violations would no longer occur and thus issued registration certificate No. 84 to defendant Jennings on April 15, 1975.

"14. The findings of defendant Trounday that construction of the two hotel-casinos described in paragraphs 10 and 11 were based on improper assumptions and did not take into account all the evidence available to him. As such, those findings constituted an abuse of discretion. Specifically, his analysis did not take into account the situation that would occur under the most adverse meteorological conditions and failed to consider CO levels within the project areas. Upon the request of plaintiffs, defendant Trounday's subordinates recalculated expected CO levels within the hotel grounds under adverse conditions using the same methodology that had been employed to assess the applicants' environmental analyses. The results of that recalculation showed that the one-hour CO standard would be exceeded by 7% and, by extrapolation, that the eight-hour standard would be exceeded by over 100%. In addition, defendant Trounday ignored evidence that the CO standards are already being exceeded at various locations along Highway 50 and that the additional traffic on the highway generated by the two casinos would cause even more severe and frequent violations.

"15. Since the construction of the Oliver and Tahoe Palace Hotels will cause violations of the ambient air quality standards for CO, defendants Kahle and Jennings could not properly be issued registration certificates under N.R.S. §445.491 (1)(b)(2) and Nevada air quality regulations §13.1.3. Therefore, construction at the two hotels violates §3.3.3 of the regulations. This constitutes a violation of an emission standard or limitation as that term is used in Clean Air Act §304 (a)(1), 42 U.S.C. §1857h-2(a)(1).

"16. On March 2, 1976, plaintiffs' attorney notified defendants of the violation described above, pursuant to the requirements of Clean Air Act §304(b), 42 U.S.C. §1857h-2(b) and 40 C.F.R. Part 54. More than 60 days has elapsed from the date on which the notice was sent.

"17. Because of the unlawful action of defendant Trounday described in paragraphs 14 and 15 and the unlawful construction activity by defendants Kahle and Jennings, the ambient standards for carbon monoxide will be frequently violated. As a result, the health and welfare of the plaintiffs will be subject to irreparable injury.

"WHEREFORE, plaintiffs pray:

"1. That this court enter its judgment declaring that registration certificate no. 88, issued to defendant Kahle and no. 84, issued to defendant Jennings are null and void.

"2. That defendants Kahle and Jennings be ordered to cease

construction on the Hotels Oliver and Tahoe Palace until valid registration certificates are obtained.

"3. That plaintiffs be awarded their reasonable costs of litigation, including reasonable attorney's and expert witness' fees, as permitted by Clean Air Act §304(d), 42 U.S.C. §1857 h-2(d).

"4. That plaintiffs have such other and further relief as this Court may deem just and proper."

In substance, the issue presented is whether a citizen can state a claim for relief for alleged violation of federal ambient air quality standards against a complex source which is about to be constructed in compliance with the approved state implementation plan. The answer depends upon a determination of Congressional intent in enactment of the Clean Air Act with amendments. In our opinion, thh a wer is "No."

The general Congressional plan to control air pollution throughout the United States is clearly discernible from the statute. Initially broad powers were granted to the Secretary of Health, Education and Welfare, for whom the Administrator of the EPA was later substituted, to conduct extensive research and investigation into the control of air pollution (42 U.S.C. 1857(b)). Funding was provided for state planning. The Secretary was granted a plenary authority to establish ambient air quality standards (42 U.S.C. 1857c-2). Each state was given an opportunity to adopt "a plan for the implementation, maintenance and enforcement of such standards of air quality adopted."

The Nevada plan was adopted (NRS 445.401 et. seq.) and was approved by the Administrator (40 C.F.R. 52.1470) with exceptions not pertinent to this action.

The Nevada statute establishes a state environmental commission in the Department of Human Resources of which defendant Trounday is the Director. The following are the statutory provisions pertaining to the processing and review of orders concerning the construction of complex sources:

"445.496 Approval of plans, specifications prerequisite to construction alteration of structure.

"1. The commission shall require, with respect to all sources of air contaminant, including complex sources, that plans, specifications and such other information as the commission may direct be submitted to the director not later than a specified interval prior to the construction or alteration of a building or other structure if such construction or alteration includes the establishment or alteration of a source or complex source of air contaminant.

"2. The local government authority, if any, responsible for

issuing any required building permit shall not issue such building permit until the registration has been made pursuant to regulation and no stop order prohibiting such construction or alteration has been issued.

"445.497 Notice of regulatory action: Requirement; method; contents of notice. When the department takes any regulatory action, under the provisions of NRS 445.401 and 445.601, inclusive, or under any rule, regulation, order or standard based thereon, it shall give reasonable notice to all parties by certified mail, which notice shall state the legal authority, jurisdiction and reasons for the action taken.

"445.498 Appeals to commission: Notice of appeal. A party aggrieved may file notice of appeal with the commission within 10 days after the date of notice of action of the department, except as otherwise provided by law.

"445.499 Appeals to commission: Hearings.

"1. Within 20 days after receipt of the notice of appeal provided for in NRS 445.498, the commission shall hold a hearing.

"2. Notice of the hearing shall be given to all affected parties no less than 5 days prior to the date set for the hearing.

"3. The commission may sit en banc or in panels of three or more to conduct hearings.

"4. The attendance of witnesses and the production of documents may be subpenaed by the commission at the request of any party. Witnesses shall receive the fees and mileage allowed witnesses in civil cases. Costs of subpenas shall be taxed against the requesting party.

"5. All testimony shall be given under oath, and recorded verbatim by human or electronic means.

"6. For the purpose of judicial review under NRS 445.571, the parties may agree upon a statement of facts in lieu of a transcript of testimony.

"7. Costs of transcribing proceedings of the commission shall be taxed against the requesting party.

"445.501 Appeals to commission: Appealable matters; commission action; rules for appeals; judicial review.

"1. Any person aggrieved by:

(a) The issuance, denial, renewal, suspension or revocation of an operating permit; or

(b) The issuance, modification or rescission of any other order, by the director may appeal to the commission.

"2. The commission shall affirm, modify or reverse any action taken by the director which is the subject of the appeal.

"3. The commission shall provide by rule for the time and manner in which appeals are to be taken to the commission.

"4. Any decision or order of the commission may be appealed as provided in NRS 233B.130."

In addition, the Nevada State Environmental Commission, in September, 1974, pursuant to statutory authorization, adopted regulations. Article III "Registration Certificates and Operating Permits" provides, in pertinent part:

"3.2.1 A separate registration certificate is required for each new single or complex source.

"3.2.2 The obtaining of a valid registration certificate is a prerequisite to the construction or alteration of any single source or complex source of air contaminant.

"3.2.3 Requests for the issuance of a registration certification or the replacement of a lost or damaged registration certificate with the appropriate fee shall be submitted to the Director of the application form provided by him.

"3.2.4 Within 5 working days after receiving an application for registration, the Director shall determine what, if any, additional information is needed. Within 15 days after receiving adequate information the Director shall make a preliminary determination to issue or deny issuance of a registration certificate. Within 75 days after receiving adequate information, pursuant to Article 13, the Director shall issue or deny issuance of a registration certificate.

"3.2.5 A registration certificate shall only expire if construction of a new or modified source, including a complex source, is not commenced within one year from the date of issuance thereof or construction of the facility is delayed for one year after initiated.

"3.2.6. The fee for each initial registration certificate, its replacement, or renewal is $10.00 and shall be made payable to the State of Nevada.

"3.3 Stop Orders:

"3.3.1 A stop order will be issued if:

"3.3.1.1 The proposed construction, installation, alterations, or establishment will not be in accordance with the provisions of the plans, specifications, and other design material required to be submitted for registration; or

"3.3.1.2 The design material or the construction itself is of such a nature that it patently cannot bring such source into compliance with these regulations.

"3.3.2 A stop order can be issued at any time before the operating permit is granted, except that a stop order for a source shall not be issued after construction or modification has com-

menced if the construction is in accordance with the provisions of the registration certificate as submitted and approved by the Director under Article 13 hereof.

"3.3.3 A person served with a stop order shall forthwith stop all activities specified in the stop order.

"3.3.4 A stop order shall be a written statement stating the reason for its issuance.

"3.3.5 A person served with a stop order may apply for its revocation at any time, setting forth the facts upon which he believes that the reasons for the issuance of the stop order no longer exist, he shall withdraw the order promptly. If the Director finds that the reasons for issuance of the stop order still exist, or that other reasons exist for continuing a stop order in effect, he shall, within 24 hours, serve a written statement of his reasons for so finding."

Article 13 "Complex Sources and Large Stationary Sources" provides:

"13.1 General Provisions for the Review of New Sources.

"13.1.1 Prior to the issuance of any registration certificates in accordance with this Article, the applicant shall submit to the Director an environmental evaluation and any other information the Director may deem necessary to make an independent air quality impact assessment. The environmental evaluation must have approval for any street or highway changes or improvements from the county, regional, or State highway agency having jurisdiction over the streets and highwaysAll affected by the complex source prior to submittal to the Director.

"13.1.2 The preliminary intent to issue or deny issuance of a registration certificate for a single or complex source shall be made within 15 days after receiving adequate information for reviewing the registration application. The application, the Director's review, and preliminary intent to issue or deny shall be made public and maintained on file with the Director during normal business hours at 1209 Johnson Street, Carson City, Nevada, and the Air Quality Region where the source is located at a site specified in a prominent advertisement by the Director for thirty (30) days to enable public participation and comment. All comments on the Director's review and preliminary intent for issuance or denial shall be submitted in writing to the Director within thirty (30) days after the public announcement. Within the time period prescribed by Article 3.2.4, the Director shall make his decision, taking into account written public comments on the Director's review and preliminary intent for issuance or denial, project proponent sub-

mittal, and the effect of such a facility on the maintenance of the ambient air quality standards as contained in Article 12 and the control strategy contained in the Air Quality Implementation Plan.

"13.1.3 The Director shall not issue a registration certificate for any source if the environmental evaluation submitted by the applicant shows, or if the Director determines, in accordance with the provisions of this Article, that the source will prevent the attainment and maintenance of the State and national ambient air quality standards or will cause a violation of the applicable control strategy contained in the approved Air Quality Implementation Plan."

NRS 233B.130 referred to in NRS 445.501(4), supra, is the Nevada Administrative Procedure Act, which provides for full judicial review of agency action under standards substantially similar to those articulated in the Federal Administrative Procedure Act.

It seems quite obvious, particulary in the light of the prayers of the complaint, supra, that the main purpose of this action is to obtain federal judicial review of state agency action, that is, the decision of defendant Trounday as Director of the Department of Human Resources to issue registration certificates to permit construction by defendants Kahle and Jennings. Viewed in this narrow perspective, no claim for relief within the limited jurisdiction of this court is stated. There is no statute which gives this court jurisdiction to review final state agency action, and quite recently even the Federal Administrative Procedure Act (5 USC 551, et. seq.) has been definitively interpreted as not constituting a grant of jurisdiction to the district courts. *Califano, Secretary v. Sanders*, U.S., February 23, 1977. Certainly, and again from this narrow perspective, there is nothing in controversy which arises under the Constitution laws or treaties of the United States so as to invoke jurisdiction under 28 USC 1331(a).

Defendants have argued this issue from the point of view that plaintiffs have not exhausted the remedies provided by the Nevada statutes. We deem this argument to be irrelevant, just as irrelevant as plaintiffs' allegations that defendant Trounday's actions were arbitrary and unreasonable. It would make no difference if plaintiffs had pursued their state administrative and judicial remedies to the hilt. If Trounday's decisions had been sustained, the claim for relief would be the same. Is it sufficient to state a claim for relief in a citizen's suit for enforcement to allege that the federal ambient air quality standards will in fact be violated by defendant's construction projects?

The jurisdiction granted to district courts to entertain citizen's suits is limited. The statute says (42 USC 185h-2):

"S 1857h-2. Citizen suits—Establishment of right to bring suit

"(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure to the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Notice

"(b) No action may be commenced—(1) under subsection (a) (1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation of (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 1857c-7(c) (1) (B) of this title or an order issued by the Administrator pursuant to section 1857c-8(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(f) For purposes of this section, the term 'emission standard or limitation under this chapter' means—

(1) a sechedule or timetable of compliance, emission limitation, standard of performance or emission standard, or (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this chapter (including a requirement applicable by reason of section 1857f of this title) or under an applicable implementation plan."

Plaintiffs argue that the complaint alleges a violation of an emission limitation under the Clean Air Act in that there is alleged a violation of "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard." The jurisdiction of the court to consider and rule upon the issue is unquestioned. In *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809 [7 ERC 1811] (D.C. Cir. 1975), enforcement by citizen's suit of a provision of an approved implementation plan fixing a deadline for closing incinerators was approved. This was patently a schedule or timetable of compliance within the statutory definition. Plaintiffs allege no violation of an emission standard. It is reasonably clear, however, that construction of a new complex source may create a condition which will be in violation of an emission limitation within the meaning of the jurisdictional grant." 'Emission limitation' is a broad term for those measures within state implementation plans which are necessary to insure attainment and maintenance of the national primary and secondary air quality standards." *Citizens Association of Georgetown v. Washington*, 383 F.Supp. 136 [6 ERC 1166] (D.C.Col. 1974). In the *Georgetown case, however, the court concluded that defendants were not required by the implementation plan and regulations to obtain construction permits.*

In the present case the situation is different. The Nevada plan does require each individual defendant to obtain registration certificates before commencing construction. They did so. This, as in Georgetown, supra, they have done nothing which offends the implementation plan. If the construction is in conformity with the implementation plan, and not in violation of it or of any other applicable regulation, there can be no violation of an emission standard or limitation. This is because the statute plainly shows that Congress intended to defer to state administrative action under approved plans in the enforcement of the law. We may observe, parenthetically, that we have studied the federal law and regulations and the state statutes and regulations in an effort to track a path through the maze. This is no easy task in the light of the numerous statutory amendments, many of which rephrased, reenacted and renumbered existing provisions, and the numerous amendments to regulations. The conclusion stated is based primarily on the following statutory provisions:

The Congressional findings (42 USC 1857(a)(3)) state: "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments."

The statute originally (42 USC 1857d (c) with respect to state

implementation plans required the Secretary (now Administrator) to make the following findings when approving a State plan:

> "... if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 1857c-2 of this title; that the plan is consistent with the purposes of this chapter insofar as it assures achieving such standards of air quality within a reasonable time; and *that a means of enforcement by State action, including authority comparable to that in subsection (k) of this section*, is provided, such State standards and plan shall be the air quality standards applicable to such State." ... (Emphasis supplied).

This provision was subsequently amended and renumbered (28 USC 1857c-5) but the deference to state control was retained. The Administrator shall approve such state plan if

> "(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply:"

The reference paragraph (4) states:

> "(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which standard of performance under section 1857c-6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A)."

The Nevada plan was approved as fulfilling the foregoing requirements. Further, the Nevada Plan was approved after adoption by the EPA of a specific regulation (40 CFR 51.18):

> "(a) Each plan shall set forth legally enforceable procedures which shall be adequate to enable the State or local agency to determine whether the construction or modification of a facility, building, structure, or installation, or combination thereof, will result in violations of applicable portions of the control strategy or will interfere with attainment or maintenance of a national standard

either directly because of emissions from it, or indirectly, because of emissions resulting from mobile source activities associated with it.

"(b) Such procedures shall include means *by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction* or modification if it will result in a violation of applicable portions of the control strategy or will interfere with the attainment or maintenance of a national standard.

"(c) Such procedures shall provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on:

"(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

"(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

"(d) Such procedures shall provide that approval of any construction or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.

"(e) Each plan shall identify the State or local agency which will be responsible for meeting the requirements of this section in each area of the State. Where such responsibility rests with any agency other than an air pollution control agency, such agency shall consult with the appropriate State or local air pollution control agency in carrying out the provisions of this section.

"(f) Such procedures shall identify types and sizes of facilities, buildings, structures, or installations which will be subject to review pursuant to this section. The plan shall discuss the basis for determining which facilities shall be subject to review.

"(g) The plan shall include the administrative procedures, which will be followed in making the determination specified in paragraph (a) of this section.

"(h) (1) Such procedures shall provide that prior to approving or disapproving the construction or modification of a facility, building, structure, or installation pursuant to this section, the State or local agency will provide opportunity for public comment on the information submitted by the owner or operator and on the agency's analysis of the effect of such construction or modification on ambient air quality, including the agency's proposed approval or disapproval." (Emphasis supplied).

The EPI adopted 40 C.F.R. 51.18 on June 18, 1973. The EPI also promulgated 40 C.F.R. 52.22 concerning new or modified indirect (complex) sources of pollution. These regulations were the hornbook for NRS 445.491, supra, and the State of Nevada Air Quality Regulations, supra. In promulgating regulations 51.18 and 52.22, the EPI relied in part, for statutory authority, upon 42 USC 1857(c)-6 enacted December 31, 1970 (P.L. 91-604). That statute concerning standards of performance for new stationary sources includes subsection c as follows (42 USC 1857c-6(c):

> "(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards (except with respect to new sources owned or operated by the United States).
>
> "(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section."

This enactment suggests to the writer that Congress intended the delegation to State authority (approved by the Administrator) of the enforcement of the regulations pertaining to new sources, retaining only in the Administrator the power of supervisiory enforcement.

The inclusion in 42 USC 1857h-2, the citizen's suit sanction, of authority of any person to commence a civil action alleging a violation of "(B) an order issued by . . . a State with respect to such a standard or limitation," carries the implication that a suit against a person in compliance with a State order is not authorized. Any other interpretation would render subsection (B) meaningless and ineffective for plenary authority would be found in subsection (A).

There are other provisions of this statutory and regulatory swamp which support the Congressional intent to defer to approved State regulatory procedures in administration, maintenance and enforcement of ambient air quality requirements.

In our view, for the reasons stated, a complaint like the one here, states no claim for relief against the State of Nevada and the Director of the Department of Human Resources and states no claim for complex or indirect sources where the complaint affirmatively shows compliance with the procedural and enforcement requirements of an approved state plan. Whether or not the state agency, in the opinion of plaintiffs, made a wrong decision is irrelevant.

It is the opinion of the Court that the deficiencies in the complaint cannot be cured by amendment.

Accordingly,

IT HEREBY IS ORDERED that the action entitled above is hereby dismissed. DATED: March 9, 1977.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE TO SAVE LAKE TAHOE, INC., a California membership corporation; CLAUDIA CORUM; DONNA ATHERTON; HILTON ATHERTON; JERRY FELDMILLER; MARILYN FELDMILLER; MARK LITZ; JOHN McCAULEY; JOHN CALLISTER; BRUCE BOHLMAN; DELTA MACK; PHIL HANNIFAN; JANET HANNIFAN; and JEFF HARRY,

Appellants,
v.

No. 77-2058
OPINION

ROGER S. TROUNDAY, Director of the Nevada Department of Human Resources; STATE OF NEVADA; NEVADA DEPARTMENT OF HUMAN RESOURCES; OLIVER KAHLE; and TED JENNINGS,

Respondents.

Appeal from the United States District Court for the District of Nevada.

Before: BARNES and CHOY, Circuit Judges, and BARTELS, * District Judge.

BARTELS, District Judge:

This appeal presents two principal issues: (a) whether federal jurisdiction exists to review a state administrative determination to issue a registration certificate for a proposed indirect source of air pollution rendered pursuant to provisions of the Nevada state implementation plan, and (2) if so, whether appellants' contention that

*The Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

such administrative determination was erroneous states a cause of action upon which relief may be granted. League to save Lake Tahoe, Inc., ("League") and others appeal from the judgement and order of the United States District Court for the District of Nevada, Thompson, J., granting appellees' motion to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Appellants instituted this action under section 304 of the Clean Air Act (hereinafter cited as the "Act"), 42 U.S.C. §1857h-2(a) (subsequently amended and recodified as 42 U.S.C.A. §7604 (West Supp. 1979)), and under the federal question statute, 28 U.S.C. §1331(a), seeking declaratory and injuctive relief to prevent the construction of two hotel-casinos on the South shore of Lake Tahoe at Stateline, Nevada.

Located within the 500 square mile Tahoe Basin, Lake Tahoe is a mountain lake of exceptional beauty, bordered on its western shore by California and on its eastern shore by Nevada. It is approximately 190 square miles in size, 1,645 feet in depth, and is renowned for its pristine clarity and scenic appeal. Because of its proximity and accessibility to the metropolitan areas of northern California and western Nevada, Lake Tahoe has rapidly become one of the most popular resort areas in the far western United States. Inevitably, however, with this increasing popularity comes the danger of serious environmental pollution, not only of the lake itself but of the Tahoe Basin and High Sierra Mountains of which the lake is a part. Mitigation of that danger is the motivating basis for this action.

Appellant League is a privately-funded non-profit membership corporation, organized under the laws of California and dedicated to protection of the environment in the Tahoe Basin, where many of its members live and work. The League is joined by thirteen individual residents of the area who allege that they will be personally injured as a result of the violations alleged in the complaint.[1] Appellees are Roger Trounday, Director of the Nevada Department of Human Resources, who is the state official charged with the duty of carrying out the air pollution laws of Nevada: the Nevada Department of Human Resources, the designated state air pollution control agency for purposes of the Act: and Oliver Kahle and Ted Jennings, owners and operators of the Hotel Oliver and the Tahoe Palace Hotel, respectively, both of which are the focus of the complaint.

Appellants charge that certain administrative actions of the state appellees and construction of the hotel-casinos by the individual appellees violate relevant provisions of the Act and Nevada's state implementation plan. Although numerous issues are raised by this appeal, we conclude that the complaint was properly dismissed by the

district court for failure to state a claim upon which relief may be granted, and, accordingly, we affirm.[2]

I

Because the factual basis of this action as set forth in the complaint is included in the opinion of the district court at 427 F. Supp. 1350, it is unnecessary here to provide more than a summary of the essential background. Pursuant to section 109(b)(2) of the Act, 42 U.S.C. §7409(b)(2), the Environmental Protection Agency ("EPA") is required in order to protect the public health to promulgate national primary ambient air quality standards for various air pollutants, including carbon monoxide ("CO"). As appears at 40 C.F.R. §50.8, EPA has promulgated such standards for CO as follows: 35 parts per million ("ppm") for a one-hour period and 9 ppm for any eight-hour period. To achieve these levels, each state is mandated under §110(a) of the Act, 42 U.S.C. §7410(a), to adopt a "plan which provides for implementation, maintenance, and enforcement" of the ambient air quality standards and to submit its implementation plan to EPA for approval. Included in each plan must be, *inter alia*, "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the ambient air quality standards. 42 U.S.C. §7410(a)(2)(B). If the plan submitted meets the substantive and procedural criteria specified in §110, EPA must approve it.

The state of Nevada submitted its implementation plan to EPA, and the portion thereof relating to the primary ambient air standard for CO was approved and accepted. 40 C.F.R. §52.1472. The portion of the plan relevant to this appeal concerns the pre-construction issuance of "registration certificates" or "permits" for "complex [or indirect] sources of air pollution." Nev. Air Quality Reg. §3.2.2. Briefly stated, the hotel-casinos here involved are classified as "indirect" or "complex" sources because, by virtue of the automobile traffic they will attract, they have or solicit

> secondary or adjunctive activity which emits or may emit any air contaminant for which there is an ambient air quality standard, notwithstanding that such property or facility may not itself possess the capability of emitting such air contaminants. Complex sources include, but are not limited to (a) highways and roads: (b) parking facilities . . . : (d) recreation, amusement, sports, or entertainment facilities.

Nev.Rev.Stat. §445.446(2). Under §13.1.1 of the Nevada air quality regulations, the owner of a proposed new complex source is required

to apply to the Director of the Department of Human Resources for a registration certificate and must submit an environmental evaluation of the project.[3] If the environmental evaluation shows, or if the Director determines, "that the source will prevent the attainment and maintenance of the State and national ambient air quality standards or will cause a violation of the applicable control strategy contained in the approved Air Quality Implementation Plan," the Director is prohibited from issuing a registration certificate. Nev.Air Quality Reg. §13.1.3.

On August 12, 1974, appellees Kahle and Jennings submitted separate applications for registration certificates for proposed new hotel-casinos. The facilty proposed by Kahle required 33,512 square feet of casino floor space, 960 hotel rooms, and parkikg for 2400 cars, and that proposed by Jennings required 32,350 square feet of casino floor space, 560 hotel rooms, various convention and theater facilities, and parking for 1600 cars. After initially rejecting both applications upon his finding that the planned construction would violate ambient air standards for CO, appellee Trounday found, based on revised applications incorporating substantial changes in the plans, that the facilities would not violate the standards, and, accordingly, he issued the requested certificates on May 19, 1975 and April 15, 1975, respectively, which issuance was subject to administrative review by the Nevada Environmental Commission pursuant to various provisions of the Nevada state implementation plan.[4]

Rather than resorting to this state administrative remedy, appellants instead demanded that the certificates be withdrawn, asserting that their issuance was an abuse of discretion because the technical analysis upon which the action was taken "did not take into account the situation that would occur under the most adverse meteorological conditions and failed to consider CO levels within the project areas." Upon appellants' request, officials of the state Department of Human Resources then "recalculated expected CO levels within the hotel grounds under adverse conditions using the same methodology that had been employed to assess the applicants' environmental analyses," and found, according to appellants, that the results indicated substantial violation of the CO standards.

When state officials did not comply with the demand to withdraw the certificates, appellants brought this action, claiming that because construction of the facilities would cause violations of the ambient air quality standards for CO cited *supra*, defendants had not complied with §3.2.2 of the Nevada air quality regulations requiring a valid certificate, and further, that this constituted a violation of an emission standard or limitation within the meaning of §304 of the Act. Accordingly, they sought a declaration that the certificates are invalid and an order restraining construction until valid certificates could be issued. Upon defendants' motion to dismiss the complaint, the district court dismissed the action on March 10, 1977, and this appeal followed.

II

The question of federal jurisdiction has been raised by all parties. Appellants contend that jurisdiction is appropriate under §304(a) of the Act—the citizen suit provision—because the Nevada indirect source review provisions cited *supra* governing new complex sources fall within the broad definition of "emission limitation" set forth in *Natural Resources Defense Council v. Environmental Protection Agency*, 489 F.2d 390, 394 n.2 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. Natural Resources Defense Council*, 421 U.S. 60, 95 S.Ct. 1470 (1975), and *Citizens Association of Georgetown v. Washington*, 383 F.Supp. 136,140 (D.D.C. 1974), and quoted with approval by this court in *City of Santa Rosa v. Environmental Protection Agency*, 534 F.2d 150, 154 (1976); *cf. Kennecott Copper v. Train*, 526sF.2d 1149 (9th Cir. 1975).[5] More precisely, 'appellants assert that the "substantive emissions limitation" violated here is the principle that new complex sources may not be built if traffic associated with them will cause violations of the ambient air quality standards.

Section 304(a) of the Act states in pertinent part as follows:

> (a) [A]ny person may commence a civil action on his own behalf—
>
> (1) against any person (including . . . any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.
>
> * * *
>
> The district courts shall have jurisdiction without regard to the amount in controversy or the citizenship fo the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

At the time this action was instituted, subsection (f) of this section defined "emission standard or limitation" as:

> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of Section 118) or under an applicable implementation plan.

The term "emission limitation" as defined in this provision has generally been interpreted to include only specific restrictions on the composition of pollutants which may be emitted into the air from a particular source or class of sources. In *Train v. Natural Resources Defense Council*, 421 U.S. at 79, 95 S.Ct. at 1481, the United States Supreme Court described emission limitations as

> regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which the enforced should result in ambient air which meets the national standards.

The *per curiam* opinion of the District of Columbia Circuit Court of Appeals in *Citizens Association of Georgetown v. Washington*, 535 F.2d 1318, 1320-21 (1976), concluded that by enacting §304 "Congress did not fling the courts' door wide open" but confined jurisdiction to "clear-cut violations by polluters." Most pertinent to the factual situation presented by this appeal, however, is the decision of the Supreme Court in *Hancock v. Train*, 426 U.S. 167, 197, 96 S.Ct. 2006, 2021 (1976), where the Court drew a distinction between substantive requirements such as "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard:: and all other state implementation plan measures, including the state permit procedure there in issue.[6] Strictly applied, these restrictive definitions of "emission standard or limitation" might effectively foreclose appellants' contention that the indirect source permitting procedure alleged to have been violated in this case is an "emission limitation," and, were there no subsequent amendments of the Act, we would be compelled in this case to find no jurisdiction under §304.

In august 1977, however, after Judge Thompson's decision had been rendered, subsection (f) of §304 was amended as part of the Clean Air Act Amendments of 1977, Pub.L. 95-95 (hereinafter cited as the "1977 Amendments"), and again in November 1977 as part of the Safe Drinking Water Amendments of 1977, Pub.L. 95-190, and the following paragraph added in further definition of "emission standard or limitation":

> (3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of

> air quality) . . . , any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), . . . , *any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans*, vehicle inspection and maintenance programs or vapor recovery requirements . . . *which is in effect under this chapter . . . or under an applicable implementation plan.* (Emphasis added.)

The congressional expansion of subsection (f) of §304 through the 1977 Amendments explicitly broadened federal jurisdiction to include alleged violations of any condition or requirement of a state implementaiton plan relating to "transportation control measures, [or] air quality maintenance plans." Although the scope of these terms as they are used in this paragraph has not been conclusively defined, we believe, based on our analysis of the amendments and their legislative history, that "indirect source review programs" are properly included within the meaning of the term "transportation control measures." *Accord, Environmental Study and Protection v. Pac, et al.*, 464 F.Supp. 143 (D. Conn. 1978).[7]

This finding is supported by certain other indications of congressional intent which, taken together, are persuasive. First, §110(a)(2) of the Act suggests various measures which the Administrator of EPA may require as part of a state implementation plan, "including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air polltuion . . . " With respect to the definition of transportation controls, the following caveat was added in subparagraph (5)(E) of section 110(a) of the Act as part of the 1977 Amendments: "For purposes of this paragraph and paragraph 2(B), the term 'transportation control measure' does not include any measure which is an 'indirect source review program.'"[8] This caveat makes explicit congressional intent that the Administrator not be authorized to require inclusion of indirect source review provisions in state implementation plans. H.R. Rep. No. 294, 95th Cong., 1st Sess. 220-27, *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1299-1306; H. Conf. Rep. No. 564, 95th Cong., 1st Sess. 126-27, *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1506-07; 42 U.S.C. §7410(a)(5).

The significance of this provision here lies in the absence of any similar restriction on the scope of "transportation control measures" as it is used in §340(f)(3), quoted *supra*, thus suggesting by negative implication that a measure which is part of an indirect source review program is included within the ambit of §304. As a matter of statutory construction, the authorities appear uniform in holding that an

explicit exclusion appearing in and specifically limited to one provision of a statute and not included in another provision of the same statute logically implies that the exclusion is inapplicable as to the latter provision. *City of Burbank v. General Electric Co.*, 329 F.2d 825,832 (9th Cir. 1964); *Arley v. United Pacific Insurance Co.*, 379 F.2d 183, 188 (9th Cir. 1967), *cert. denied*, 390 U.S. 950, 88 S.Ct. 1039 (1968); *Marshall v. B.W. Harrision Lumber Co.*, 569 F.2d 1303, 1307 (5th Cir. 1978). Thus, were indirect source review programs intended to be excluded also from "transportation control measures" as used in §304(f), it seems to us that Congress would have said so, as it did in §110(a).[9]

Second, a more significant indication of congressional intent can be drawn from the Report of the Committee on Conference on the 1977 Amendments. H.Conf. Rep. No. 564, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1502 *et seq.* Although the amendments to §304 of the Act agreed upon by the Conference Committee and subsequently adopted without change by the Congress contain no explicit reference to indirect source review requirements,[10] the Committee's Report accompanying and explaining those particular amendments makes specific mention of such requirements in referring to transportation control measures. Under the heading "Conference Agreement," the Report states, in pertinent part:

> The House concurs in the Senate amendment with the following amendments: citizen suits are authorized against sources to enforce compliance only with respect to (1) "emission standards or limitations," including schedules and timetables for compliance, not subject to citizen suits under the Act: . . . and (3) the violation of any condition or requirement specified by the State or the Administrator under a significant deterioration or non-attainment permit or under a delayed compliance order, enforcement order, smelter order, or compliance date extension: . . . *transportation control plans or indirect source review requirements*, vehicle inspection and maintenance programs: . . . [and] air quality maintenance plan requirements . . . (Emphasis added.)

Id. at 173, *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1553-54. This explanatory language of the committee, read together with the more economical wording of the statute itself, constitutes strong evidence that the intended scope and meaning of "transportation control measures" encompasses any direct source review requirements contained in an applicable state implementation plan. Thus construed, the amendment to §304(f) in effect places in the

same category as substantive emission requirements any indirect source review provisions adopted and approved as part of a state plan. Although ambiguous legislative history should not be allowed to control the ordinary meaning of statutory language, *National Labor Relations Board v. Plasterers' Local No. 79*, 404 U.S. 116, 129-30 92 S.Ct. 360, 368 (1971), the expressed understanding of the Conference Committee, commended to the full Congress in the Conference Report and subsequently adopted, is not lightly to be disregarded, particularly where as here, that understanding is supported by other evidence as well. *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 (D.C. Cir 1978); *International Tel. & Tel Corp. v. General Tel. & Electronics Crop.*, 518 F.2d 913, 921 (9th Cir. 1975).

It is a well established principle of statutory construction that words of a statute be placed in their proper context by resort to legislative history where they are not conclusive as to congressional intent. *Tidewater Oil Co., v. United States*, 409 U.S. 151,158, 93 S.Ct. 408,413 (1972); *Walt Disney Productions v. United States*, 480 F.2d 66,68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1451 (1974); *Ralpho v. Bell*, 569 F.2d 636,638, 186 U.S. App.D.C. 397 (1977). The above history and analysis of the amendments provide sufficient illumination to enable us to find that the phrase "transportation control measures" in §304(f)(3) of the Act includes indirect source review provisions such as the Nevada complex source regulations here involved.

It further appears to us that, although the amendment relevant here was adopted during the pendency of this action, it is nonetheless applicable to this appeal. Section 406(d)(1) of the 1977 Amendments, 42 U.S.C. §7401 note, provides that "[e]xcept as otherwise expressly provided, the amendments made by this Act [the 1977 Amendments] shall be effective on the date of enactment [August 7, 1977]." Such a provision is consistent with the decision of the United States Supreme Court in *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 712, 94 S.Ct. 2006,2016 (1974), rejecting the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature, and upholding the general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction of legislative history to the contrary." *See also Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202 (1919); *Thorpe v. Housing Authority of city of Durham*, 393 U.S. 268, 281-83, 89 S.Ct. 518, 526-27 (1969); *United States v. Blue Sea Line*, 553 F.2d 445, 448-50 (5th Cir. 1977); *Beazer v. New York City Transit Authority*, 558 F.2d 97,100 (2d Cir.

1977). In view of the express provision for immediate effectiveness in §406 of the 1977 Amendments and because no manifest injustice would result, application of the amendments to this action is proper. Thus, the district court has jurisdiction under §304 of the Act to consider the alleged violation of the Nevada complex source regulations.

III

Having determined jurisdiction under §304, we turn next to the question of whether the complaint, which alleges a violation of the same section, states a cause of action upon which relief may be granted. The district court dismissed the amended complaint as stating no cognizable claim because it "affirmatively shows compliance with the procedural and enforcement requirements of an approved state [implementation] plan." 427 F.Supp. at 1360. Appellants dispute this conclusion, arguing that when constructed the two hotel-casinos involved will violate the applicable ambient air quality standards for CO and, therefore, that the registration certificates issued are invalid. Because the Nevada air quality regulations, incorporated in the state implementation plan, authorize construction only of complex sources for which a valid certificate has been issued, appellants argue that the regulations have been violated in this case and, further, that such violation constitutes a violation of an emission limitation. In other words, they equate violation of the ambient air quality standard, which may result from the issuance of an allegedly invalid registration certificate, with violation of an emission limitation.

The effect of appellants' position is to blur the established distinction between an "emission standard or limitation" and the ambient air quality standards. To adopt their view would not only contravene the principle that such air quality standards are not emission limitations, *Plan For Arcadia, Inc. v. Anita Associates*, 501 F.2d 390,392 (9th Cir.) *cert. denied*, 419 U.S. 1034, 95 S.Ct. 517 (1974); *Thompson v. Chicago*, 7 E.R.C. 1682 (N.D. Ill. 1975); *New Mexico Citizens v. Train*, 6 E.R.C. 2061, 2064 (D.N.M. 1974), but would also sanction federal jurisdiction based solely upon allegations of a prospective violation of the ambient air quality standards. Section 304(a) of the Act provides no basis for such a suit. Nor could such an interpretation be reconciled with the accepted definition of "emission standard or limitation," the purpose of which is to insure achievement and maintenance of the ambient air quality standards. *Train v. Natural Resources Defense Council*, 421 U.S. at 79, 95 S.Ct. at 1481. In discussing this phrase in light of the legislative history of the

Act, the District of Columbia Court of Appeals stated in *Citizens Association of Georgetown v. Washington*, 535 F.2d at 1322:

> The enumerated items [*i.e.* emission standards or limitations] were intended as "objective evidentiary standard[s] [which] would have to be met by the citizen who brings an action under the [citizen suit provision]." S.Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970), *reprinted in* Legislative History, *supra*, at 436. The determination of whether a government instrumentality or other "person" is a polluter for purposes of section 304 was to be made against these objective standards, which were to be "settled in the administrative procedure leading to an implementation plan or emission control provision." *Id.*, *reprinted in* Legislative History *supra*, at 436. Congress expressly intended that an alleged violation not involve "reanalysis of technological or other considerations at the enforcement stage." *Id.*, *reprinted in* Legislative History, *supra*, at 436.

As applied to the indirect source review procedure here involved, these objective standards certainly include the specific limitations on construction and facility size imposed as conditions upon approval of the application for a registartion certificate. More to the point in this case, however, such standards, as defined under the 1977 Amendments, would also include the procedural provisions of the Nevada state implementation plan cited *supra* requiring application for a certificate for any proposed new complex source, review of that application by designated state officials, and issuance of the certificate unless the "environmental evaluation submitted by the applicant shows, or the Director determines, that the source will prevent the attainment and maintenance" of the ambient air quality standards. As the district court correctly emphasized, there has been complete compliance with all these requirements of the Nevada plan, and appellants are simply attempting through this action to obtain federal court review of an administrative decision entrusted by Congress to state officials. *See* 42 U.S.C. §7401(a)(3).[11] Unlike the situation in *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977) and 535 F.2d 165 (2d Cir. 1976), cited repeatedly by appellants, where state officials were admittedly in violation of explicit strategies incorporated in the New York state implementation plan, appellees here have each fulfilled their respective obligations under the Nevada plan. For us now to hold that, after having done so, they are still subject to a valid claim for violation of an emission limitation based upon those same actions would be an anomalous result which we believe is

mandated neither by the Act nor by the Nevada plan promulgated and approved pursuant to the Act.

Appellants' most specific allegation concerning the registration certificates challenges the failure of appellee Trounday in conducting his analysis of the applications involved to factor in the "most adverse meteorological conditions." They have cited no federal or state statutes or regulations, however, mandating consideration of such a factor as an essential precondition to issuance of a permit. Absent authority for appellants' contention, we believe that discretion should properly repose in the responsible state officials to establish such computer methods and analysis as they deem appropriate.

Thus, we conclude that appellants have failed to allege facts constituting a violation of a specific emission limitation and, therefore, that they have not stated a cause of action upon which relief may be granted under §304(a) of the Act. Appellants' challenge to the administrative determinations made by Nevada officials pursuant to relevant provisions of the Nevada plan should have been pursued through the administrative review procedures set forth as part of the plan.[12] *See American Federation of Government Employees, Local 1168 v. Dunn*, 561 F.2d 1310, 1314-15 (9th Cir. 1977); *Shell Oil Company v. Train*, 585 F.2d 408, 414 (9th Cir. 1978); *California Tahoe Regional Planning Agency v. Jennings, et al.*, 594 F.2d 181, 190-92 (9th Cir. 1979). Their failure to pursue that avenue of review within the applicable time limitations does not now entitle them to a remedy in a federal forum. *Id.*[13]

Accordingly, the decision of the district court dismissing the complaint in this action is hereby AFFIRMED.

Footnotes

[1] The individual appallants are Donna Atherton, Hilton Atherton, Bruce Bohlman, John Callister, Claudia Corum, Jerry Feldmiller, Marilyn Feldmiller, Janet Hannifan, Phil Hannifan, Jeff Harry, Mark Litz, Delta Mack, and John McCauley. They allege that the diminution of the value of their property and the increased costs of health care due to the violations alleged in the complaint will excess $10,000 for each of them.

[2] In reaching this conclusion, we find without merit appellees' contention that this action be dismissed as moot. In support of their claim, appellees cite (1) the enactment by the Nevada legislature of Nev. Rev. Stat. §445.493(2), providing for the expiration in 1977 of that state's authority to review new complex sources; (2) the indefinite suspension by the U.S. Environmental Protection Agency ("EPA") of federal indirect source regulations on July 3, 1975 (40 Fed. Reg. 28064); and (3) the elimination by Congress through the Clean Air Act Amendments of 1977, Pub. L. 95-95 (hereinafter cited as the "1977 Amendments"), of EPA's authority to require inclusion of indirect source provisions in state implementation plans. These developments are rendered irrelevant, however, by §110(d) of the Act, which provides that the applicable state implementation plan is the "plan or most recent revision thereof, which has been approved . . . or promulgated." 42 U.S.C. §7410(d). EPA has approved no revision of the applicable Nevada state implementation plan suspending the provisions relevant to this appeal, nor has any postponement been granted under §110(f) of the Act. Until Nevada's unilateral suspension of its indirect source review provisions is approved by EPA, we must consider effective the complex source regulations incorporated in the plan. *See Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 96 S.Ct. 2518, 2523 n.3 (1976); "Approval and Promulgation of Implementation Plans: Connecticut Revision," 44 Fed.Reg. 5427-29 (Jan. 26, 1979); *see also* 123 Cong. Rec. S13704 (daily ed. Aug. 4, 1977) (statement of Senator Muskie that §110(a)(5)(A)(iii) "does not affect in any way" an indirect source program contained in a state plan already approved by EPA). Thus, we conclude that this action is not moot.

[3] Only those new complex sources specified in §13.2 of the Nevada air quality regulations are subject to this registration requirement. That provision states, in pertinent part:

> 13.2 The following new complex sources . . . shall apply for registration certificates in accordance with this Article.
>
> 13.2.1 New parking areas or facilities or other new complex sources with associated parking areas or facilities with capacities of 1,000 motor vehicles or more.

* * *

[4] See note 12 *infra*.

[5] The explanation of "emission limitation" by the Fifth Circuit Court of Appeals in *Natural Resources Defense Council v. Environmental Protection Agency*, 489 F.2d 390, 394 n.2 (1974), *rev'd on other grounds sub nom. Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), is as follows:

> ["Emission limitation"] is an inclusive term referring to any type of control to reduce the amount of emissions into the air. This includes, of course, "emission standards", but it also includes a number of regulary (sic) devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying limits on the sulfur content of fuel that fuel-burning emission sources may burn: "transportation controls" designed to reduce the use of motor vehicles, either through the development of mass transit system, or through traffic control devices, commuter taxes, gasoline rationing, or parking restrictions; and the imposition of emission charges or other economic incentives aimed at including parties to reduce their emissions voluntarily.

[6] In *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006 (1976), the Court held state permit requirements for new air contaminant sources inapplicable to federal facilities under §118 of the Act, 42 U.S.C. §7418. In discussing the intended scope of §118 and its relationship to §304, the Court stated:

> [We] find it significant that §304(f) extends the enforcement power only to "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard," and not to all state implementation plan measures.
>
> * * *
>
> [W]e cannot credit the argument that §118 was intended to impose on federal installations any broader duty to comply with state implementation plan measures than specified in §304. The absence in §304 of any express provision for enforcing state permit requirements in federal court is therefore too substantial an indication that congressional understanding was that the "requirements" federal facilities are obliged to meet under §118 did not include permit requirements to be overcome by assertions to the contrary.

Id. at 197-99, 96 S.Ct. at 2021.

[7] Although the court in *Environmental Study and Protection v. Pac, et al.*, 464 F. Supp. 143 (D. Conn 1978), relied primarily on the phrase "air quality maintenance plan" in finding jurisdiction under §304, it suggested that the indirect source review program there in issue could also be characterized as a "transportation control measure." For reasons stated *infra*, we believe that an indirect source review program is properly included within the term "transportation control measures."

[8] An "indirect source review program:; is defined in §110(a)(5)(D) of the Act as follows:

> (D) For purposes of this paragraph the term "indirect source review program" means the faciltiy-by-faciltiy review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—
>
> (i) exceeding any national primary ambient air quality standard for a mobile sourcerelated air pollutant after the primary standard attainment date, or
>
> (ii) preventing maintenance of any such standard after such date.

[9] There are other indications in the legislative history of the 1977 Amendments that the term "transportation control measures" sometimes includes indirect source review requirements. For example, in the Report of the House Committee on Interstate and Foreign Commerce indirect source review regulations are cited as one example of a transportation control strategy. H.R. Rep. No. 294, 95th Cong., 1st Sess. 282, *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1361. Another such example appears in §202 of the House bill, where "transportation control measure" is defined to exclude all regulation of parking, which is one form of indirect source regulation. In its Report, the House Committee explained that "[t]he purpose of this exclusion is to assure that all regulation of parking is subject ot the limitations of section 201" of the House bill, pertaining specifically to the regulation of indirect sources. *Id.* at 231, *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1310. Just as in §110 of the Act, discussed *supra*, this explicit exclusion would have been unnecessary if "transportation control measures" were in all cases understood as exclusive of indirect source requirements.

[10] As adopted by the Conference Committee, §303(b) of the 1977 Amendments provided in part as follows:

> (b) Section 304(f) of the [the Clean Air Act] is amended by . . . adding the following new paragraph at the end thereof:
>
> "(3) any condition or requirement of a permit under part C of title I (relating to significatn deterioration of air quality) or part D of title I relating to nonattainment), any condition or requirement of section 113(d) (relating to certain enforcement orders), section 119 (relating to primary nonferrous smelter orders), requirements under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 211 (3) and (f) (relating to fuels and fuel additives), or section 169A (relating to visibiltiy protection), any condition or requirement under part B of title I (relating to ozone protection) any requirement under section 111 or 112 (without regard to whether such requirement is expressed as an emission standard or otherwise)."
>
> * * *

H. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 94-95 (1977).
The Amendments were approved by voice vote as part of the Conference Report on August 4, 1977. *See* 123 Cong. Rec. H8672, S13711 (daily ed. Aug. 4, 1977).

[11] In its findings in Subchapter I of the Act, Congress explicitly stated that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments." 42 U.S.C. §7401(a)(3).

[12] The Nevada state implementation plan provided for an appeal of any action of the Department of Human Resources of any action of the Department of Human Resources to the Nevada State Environmental Commission. Nev. Rev. Stat. §445.501; Nev. Air Quality Reg. §2.10; Nev. Env. Com. Admin. Rule 8. Nev. Rev. Stat. §445.598 requires the party aggrieved to file a notice of appeal with the Commission within 10 days after the date of notice of the action of the Department. Rule 8 of the Administrative Rules also imposes the same 10-day limitation on the time for filing an appeal. Both the Nevada Revised Statutes and the Administrative Rules require that upon appeal the Commission shall hold a public hearing and make a complete record and findings. Nev. Rev. Stat. §445.499; Nev. Env. Com. Admin. Rules 9-15.
Because appellant League intervened in the application proceeding, it cannot claim lack of notice of the actions in question. Nor, in view of its allegations in the amended complaint pertaining to standing, do we believe that it can seriously argue that it was not sufficiently aggrieved to appeal the administrative action.

[13] This does not mean, however, that appellants are entirely without a remedy. One condition of the registration certificates issued to appellees Jennings and Kahle bears upon the possibility that the casinos, when constructed, may cause a violation of the ambient air quality standards. As described in a letter dated June 11, 1975 from appellee Trounday to James Bruner, Jr., Executive Director of the League, that condition is as follows:

> If within one year after construction, after an on-site inspection, the Director determines that the facility may cause a violation of the ambient air quality standards, the developer is responsible for monitoring and the necessary modification. One year after the construction completion, the Director is responsible for the issuance of any necessary notices of violation and, after their issuance, the Environmental Commission, during an administrative hearing, may levy an administrative fine of up to $5,000 per day of violation.

APPENDIX C

Clean Air Act, 42 U.S.C. §§7410(a), 7604

IMPLEMENTATION PLANS

SEC. 110. (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor

emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 128;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearing, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 171 (2)) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas);

(J) it meets the requirements of section 121 (relating to consultation), section 127 (relating to public notification), part C (relating to prevention of significant deterioration of air quality and visability protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this Act a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this subparagraph, the reasonable costs (incurred after such date of enactment) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

CITIZEN SUITS

SEC. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdistion, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1)—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 118.

(f) For purposes of this section, the term "emission standard or limitation under this Act" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan, or

(3) any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment), any condition or requirement of section 113(d) (relating to certain enforcement orders), section 119 (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 211 (e) and (f) (relating to fuels and fuel additives), section 169A (relating to visibility protection), any condition or requirement under part B of title I (relating to ozone protection), or any requirement under section 111 or 112 (without regard to whether such requirement is expressed as an emission standard or otherwise).

NEVADA SIP -- Air Quality Regulations

ARTICLE 2 - REGISTRATION CERTIFICATES

2.1 A separate registration certificate is required for each new single or complex source.

2.2 The obtaining of a valid registration certificate is a prerequisite to the construction or alteration of any single source or complex source of air contaminant.

2.3 Requests for the issuance of a registration certificate or the replacement of a lost or damaged registration certificate with the appropriate fee shall be submitted to the Director on the application form provided by him.

2.4 Within 5 working days after receiving an application for registration, the Director shall determine what, if any, additional information is needed. Within 15 days after receiving adequate information the Director shall make a preliminary determination to issue or deny issuance of a registration certificate. Within 75 days after receiving adequate information, pursuant to Article 13, the Director shall issue or deny issuance of a registration certificate.

2.5 A registration certificate shall only expire if construction of a new or modified source, including a complex source, is not commenced within one year from the date of issuance thereof or construction of the facility is delayed for one year after initiated.

2.6 The fee for each initial registration certificate, its replacement, or renewal is $10.00 and shall be made payable to the State of Nevada.

ARTICLE 13 - COMPLEX SOURCES AND LARGE STATIONARY SOURCES

13.1 General Provisions for the Review of New Sources

13.1.1 Prior to the issuance of any registration certificates in accordance with this Article, the applicant shall submit to the Director an environmental evaluation and any other information the Director may deem necessary to make an independent air quality impact assessment. The environmental evaluation must have approval for any street or highway changes or improvements from the county, regional, or State highway agency having jurisdiction over the streets and highways affected by the complex source prior to submittal to the Director.

13.1.2 The preliminary intent to issue or deny issuance of a registration certificate for a single or complex source shall be made within 15 days after receiving adequate information for reviewing the

registration application. The application, the Director's review, and preliminary intent to issue or deny shall be made public and maintained on file with the Director during normal business hours at 1209 Johnson Street, Carson City, Nevada, and in the Air Quality Region where the source is located at a site specified in a prominent advertisement by the Director for thirty (30) days to enable public participation and comment. All comments on the Director's review and preliminary intent for issuance or denial shall be submitted in writing to the Director within thirty (30) days after the public announcement. Within the time period prescribed by Article 3.2.4, the Director shall make his decision, taking into account written public comments on the Director's review and preliminary intent for issuance or denial, project proponent submittal, and the effect of such a facility on the maintenance of the ambient air quality standards as contained in Article 12 and the control strategy contained in the Air Quality Implementation Plan.

13.1.3 The Director shall not issue a registration certificate for any source if the environmental evaluation submitted by the applicant shows, or if the

Director determines, in accordance with the provisions of this Article, that the source will prevent the attainment and maintenance of the State and national ambient air quality standards or will cause a violation of the applicable control strategy contained in the approved Air Quality Implementation Plan.

13.1.4 The Director may impose any reasonable conditions on his approval, including conditions requiring the source owner or operator to conduct ambient air quality monitoring at the facility site for a reasonable period prior to the commencement of construction or modification, and for any specified period after the source has commenced operation.

13.1.5 Where a proposed source located on contiguous property is constructed or modified in increments which individually are not subject to review as provided in this Article, all such increments occurring since the effective date of this Article shall be added together for determining the applicability of this Article.

13.1.6 Approval and issuance of a registration certificate to any source construction or

modification shall not affect the responsibilities of the owner or owners to comply with any other portion of the control strategy.

13.1.7 Any source or proposed facility shall, upon written application to the Director, receive within thirty (30) days a written notice of his determination, either requiring the submittal of an environmental evaluation or exempting the source from such requirement.

13.1.8 The Director shall issue a notice of violation to any owner or operator who:

a. fails to construct a complex source in accordance with the application as approved by the Director; or

b. fails to construct and operate a complex source in accordance with the conditions imposed by the Director as conditions of the registration certificate; or

c. commences construction or modification of a complex source without applying for and receiving a registration certificate as required by these regulations.

13.2 The following new complex sources or a modification to an existing complex source as specified below or other such facilities as the Director may specify upon written notice shall apply for registration certificates in accordance with this Article.

13.2.1 New parking areas or facilities or other new complex sources with associated parking areas or facilities with capacities of 1,000 motor vehicles or more.